Supreme Court, U.S.
FILED
FEB 16 2011
OFFICE OF THE CLERK

No. 10-649

IN THE

Supreme Court of the United States

APOLLO GROUP, INC., *et al.*,
Petitioners,

v.

POLICEMEN'S ANNUITY AND
BENEFIT FUND OF CHICAGO,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

DANIEL J. TYUKODY
JASON L. KRAJCER
ORRICK, HERRINGTON
& SUTCLIFFE LLP
777 South Figueroa Street
Suite 3200
Los Angeles, CA 90017
(213) 629-2020

E. JOSHUA ROSENKRANZ
Counsel of Record
ORRICK, HERRINGTON
& SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019
(212) 506-5000
jrosenkranz@orrick.com

Counsel for Petitioners

CORPORATE DISCLOSURE STATEMENT

Petitioner Apollo Group, Inc. has no parent corporation, and no publicly traded corporation owns more than 10% of its stock.

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT i

TABLE OF AUTHORITIES iv

INTRODUCTION 1

I. THIS CASE SQUARELY PRESENTS THE LEGAL ISSUES 2

II. THE CIRCUITS ARE SPLIT REGARDING WHETHER THE ANALYSIS OF PREVIOUSLY DISCLOSED FACTS CAN CONSTITUTE A CORRECTIVE DISCLOSURE 5

III. THE CIRCUITS ARE SPLIT REGARDING HOW QUICKLY INFORMATION IS INCORPORATED INTO PRICE 10

CONCLUSION 13

TABLE OF AUTHORITIES

CASES

Archdiocese of Milwaukee Supporting Fund, Inc. v. Halliburton, 597 F.3d 330 (5th Cir. 2010), *cert. granted sub nom. Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 856 (2011) (No. 09-1403) 6, 7, 9

Basic Inc. v. Levinson, 485 U.S. 224 (1988) 2, 10, 13

In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410 (3d Cir. 1997) 12

Dura Pharms., Inc. v. Broudo, 544 U.S. 336 (2005) ..... *passim*

In re Merck & Co. Sec. Litig., 432 F.3d 261 (3d Cir. 2005) 8

Miller v. Thane Int'l, Inc., 615 F.3d 1095 (9th Cir. 2010) 12

In re Omnicom Grp., Inc. Sec. Litig., 597 F.3d 501 (2d Cir. 2010) 7, 11

Oran v. Stafford, 226 F.3d 275 (3d Cir. 2000) 10, 11, 12

In re PolyMedica Corp. Sec. Litig., 432 F.3d 1 (1st Cir. 2005) 11

Teachers' Ret. Sys. v. Hunter,
477 F.3d 162 (4th Cir. 2007) 6, 8, 9

Teamsters Local 445 Freight Division Pension Fund v. Bombardier, Inc., 546 F.3d 196
(2d Cir. 2008) 11, 12

Thompson v. *RelationServe Media, Inc.*,
610 F.3d 628 (11th Cir. 2010) 11

MISCELLANEOUS

Restatement (Second) of Torts § 548A (1977) 6

INTRODUCTION

Plaintiff acknowledges the circuit split on the first question presented, namely how rapidly information must be incorporated into price in a fraud-on-the-market case. It denies the existence of a circuit split on the second question, namely whether the analysis of previously reported facts can qualify as a fraud revealing corrective disclosure under *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005). But it has not persuasively refuted the point that four other circuits would have decided that issue as a matter of law against plaintiff.

Plaintiff contends that neither of these questions is presented in this case, because a properly instructed jury found that Kelly Flynn's analyst reports were corrective disclosures. But the point is that no other circuit that has addressed these issues would have allowed a jury to decide that question. Every other circuit would have concluded that Flynn's reports were not corrective disclosures because they did not offer any new, fraud-revealing facts but merely Flynn's analysis of already public facts.

This case provides an excellent vehicle for review because it provides a full record following trial and a simple fact pattern that squarely presents the issues. While plaintiff argues that the gap of "only four trading days" between the newspaper articles and the September 21 price decline makes this case a poor one for line-drawing, in fact precisely the opposite is true. This case would allow the Court to articulate a standard that might be used in close

cases and that would answer important, recurring questions left unanswered by *Basic Inc. v. Levinson*, 485 U.S. 224 (1988).

I. THIS CASE SQUARELY PRESENTS THE LEGAL ISSUES

Plaintiff argues that this case does not truly present either of the questions presented "because the jury, dutifully applying the instructions Apollo concedes are correct, actually found a stock price decline that came immediately after a fraud-revealing disclosure and continued into the next day." Opp. 1.

Plaintiff's fundamental premise is incorrect. As a matter of law, the Flynn reports did not satisfy the requirements of *Dura*. The Flynn reports disclosed no new, fraud-*revealing facts*, a point plaintiff implicitly concedes when it states that the reports provided "new, fraud-*related information*." *Id.* Plaintiff's formulation begs the question: is the analysis of already public facts sufficient to comprise a corrective disclosure, or must the disclosure present new, fraud-revealing facts?

According to the opposition's opening paragraph, the "fraud" in this case consisted of Apollo "making misrepresentations about a highly critical report by the U.S. Department of Education ("DOE") that had major implications for Apollo's future prospects." *Id.* However, regardless of how one characterizes Apollo's prior statements, after the widespread disclosure of the contents of the DOE report and its potential consequences for Apollo were reported in the September 14 and 15 newspaper articles, the re-

port's "major implications for Apollo's future prospects" were facts in the public domain. They were also facts that did not cause a statistically significant price drop.

About a week later came the Flynn reports. Plaintiff asserts there are two things about the Flynn reports that constituted "new, fraud-related information" that were not addressed in the newspapers: (i) "the increased risks arising from the DOE Report" and (ii) "the corrective actions demanded by DOE and taken by Apollo in response to the Report." Opp. 1-2.

Neither of these assertions withstands critical analysis. For example, the *Arizona Republic* article of September 14 said that the DOE report cataloged enrollment advisor compensation and sales practices that ranged "from illegal to unethical to aggressive." ER 580. It said "[t]he report *ordered changes*" in the way Apollo compensated and rewarded its enrollment advisors. ER 581 (emphasis added). It also noted that the "company did change its recruiter compensation plan . . . to make it clearer for regulators." *Id.* The *Dallas Morning News* quoted the report's conclusion that Apollo "systematically and intentionally operates in a duplicitous manner so as to avoid the Department's prohibition against incentive compensation while evading detection" and it "flaunts [sic] the department's regulations and prohibition against incentive compensation based on enrollments." ER 594. It stated that Apollo had "institute[d] a new compensation plan in June." ER 595. The *Wall Street Journal* similarly commented upon the change in the compensation system. It re-

ported that "details of the Education Department report are catching some investors by surprise," ER 672, and that the report "raises the question of whether a too-aggressive approach contributed to Apollo's dazzling growth." ER 671. It also suggested that as a result of being "forced to tone down its approach," Apollo would "grow more slowly." *Id.*

These newspaper articles obviously did articulate "increased risks arising from the DOE Report" and Apollo's "corrective actions." What Flynn followed with almost a week later were her "concerns that enrollment growth may be hurt by bad publicity, increasing enrollment advisor turnover, market maturation, and competition." ER 491. None of this could fairly be called a fraud-revealing fact, as opposed to an analyst commenting on previously known facts.

Thus, the Ninth Circuit was plainly wrong to the extent that its holding was premised on the view that the jury could have found that the Flynn reports contained "additional . . . fraud-related information." App. 2a. None of it could fairly be described as "additional." All that was "new" in the Flynn reports was her description of conversations with some past and present enrollment advisors, some of whom said that turnover had increased. ER 502. Flynn did not present this as an objectively true fact—only what "some" people had said—and the only evidence offered at trial was that enrollment advisor turnover actually decreased. ER 502; App. 11a. Moreover, as the district court correctly recognized, Apollo had made no representations about enrollment advisor turnover, so even if

the "some said" statement were objectively true, it should not have qualified as a new fraud-revealing fact under *Dura*. *See* ER 502; App. 11a ("[Plaintiff] did not present any evidence linking this claim to Apollo's misrepresentations").

Yet, as plaintiff points out (Opp. 24-25), the Ninth Circuit focused almost all its attention on this statement that was presented as little more than rumor, which was not even true, and which, in any event, was well within the foreseeable consequences of the previously disclosed facts. Thus, on a very simple record, this case squarely presents the question whether an analyst's assessment of previously disclosed facts can constitute a corrective disclosure. If, as defendants believe, *Dura* does not permit this, then this case also squarely presents the question whether the lag time between the newspaper articles and the price decline was too long.

II. THE CIRCUITS ARE SPLIT REGARDING WHETHER THE ANALYSIS OF PREVIOUSLY DISCLOSED FACTS CAN CONSTITUTE A CORRECTIVE DISCLOSURE

Before the Ninth Circuit's decision in this case, no circuit had ever held that an analyst report that commented upon already public facts could constitute a corrective disclosure. The Ninth Circuit's decision is squarely at odds with that of four other circuits, where the Flynn reports would not be considered corrective disclosures as a matter of law.

Plaintiff argues that neither the Court's decision in *Dura*, nor the decisions of other circuits, actually

requires the disclosure of fraud-revealing *facts*, as opposed to analysis of already public facts. *See* Opp. at 23 ("Apollo's [reliance] on *Dura*'s use of the word 'facts' . . . . is a remarkable feat of over-reading.").

The relevant passage in *Dura* states:

> [T]he Restatement of Torts, in setting forth the judicial consensus, says that a person who "misrepresents the financial condition of a corporation in order to sell its stock" becomes liable to a relying purchaser "for the loss" the purchaser sustains "when the *facts* . . . become generally known" and "as a result" share value "depreciate[s]."

544 U.S. at 344 (quoting Restatement (Second) of Torts § 548A cmt. b (1977)) (emphasis added).

This passage suggests not only that a corrective disclosure must be comprised of "facts," but that it must be comprised of *fraud-revealing* facts, *i.e.*, that "facts . . . become generally known" that remove the inflation in the stock price due to the prior misstatements. As a number of courts have held, under *Dura* a plaintiff must demonstrate the existence of a corrective disclosure that reveals a defendant's prior misrepresentations to have been fraudulent. *See, e.g., Teachers' Ret. Sys. v. Hunter*, 477 F.3d 162, 187 (4th Cir. 2007) ("To allege loss causation in this case, plaintiffs would have to allege that the market reacted to *new facts* disclosed in June 2003 that *revealed* [defendant's] previous representations to have been fraudulent.") (emphasis added); *Archdiocese of*

Milwaukee Supporting Fund, Inc. v. Halliburton, 597 F.3d 330, 338 (5th Cir. 2010) (explaining "the need for the corrective disclosures to *reveal* the actionable truth about prior misstatements") (emphasis added), *cert. granted sub nom. Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 856 (2011) (No. 09-1403).

The Ninth Circuit's standard—with its focus on "fraud-*related information*," App. 2a (emphasis added), rather than fraud-*revealing facts*—dilutes *Dura*'s loss causation requirement. It is largely indistinguishable from the "touches upon" standard of loss causation that *Dura* explicitly rejected. *See* 544 U.S. at 343 ("To 'touch upon' a loss is not to *cause* a loss, and it is the latter that the law requires."). Similarly, to "relate" to a fraud is not to "reveal" a fraud. *See Halliburton*, 597 F.3d at 339 (press release not corrective disclosure because "[a]t most, the release *relates to* prior estimates that asbestos reserve levels were adequate generally, but *it does not correct* a specific prior alleged misstatement") (emphasis added).

Plaintiff's contention that the cases cited in the petition do not reflect a genuine circuit split with the standard applied by the Ninth Circuit in this case is not supportable. *In re Omnicom Group, Inc. Securities Litigation*, 597 F.3d 501, 512 (2d Cir. 2010) stands for the proposition that "a negative characterization of already public information" cannot constitute a corrective disclosure. Plaintiff argues that *Omnicom* is distinguishable because the *Wall Street Journal* article in that case "did not 'even purport to reveal some undisclosed fact with regard to . . . spe-

cific misrepresentations in the complaint.'" Opp. 20. However, the Flynn reports also did not disclose any new fraud-revealing facts. Her analysis consisted of an estimate of future prospects, not a correction of past statements.

Similarly, in *In re Merck & Co. Securities Litigation*, 432 F.3d 261, 269-70 (3d Cir. 2005), the Third Circuit held that a *Wall Street Journal* reporter's analysis of the magnitude of an allegedly improper revenue recognition practice did not constitute a corrective disclosure where the company had previously disclosed the practice. Plaintiff argues that *Merck* "carefully *avoided* announcing a rule that analysis of existing information could never amount to a corrective disclosure" and "invite[d] a case-specific determination of whether a particular analysis rises to the requisite level." Opp. 19. But plaintiff does not say what that "requisite level" means or requires. Regardless, this case stacks up poorly next to *Merck*, where the reporter's analysis was directly related to the alleged omission. Here, Flynn's projections were based on known facts and did not correct anything.

Flynn's reports also would not be considered a corrective disclosure in the Fourth or Fifth Circuits. In *Teachers' Retirement*, the Fourth Circuit held that only the disclosure of "*new facts* . . . that *revealed* . . . previous representations to have been fraudulent" can constitute a corrective disclosure. 477 F.3d at 187 (emphasis added). Plaintiff erroneously asserts that *Teachers' Retirement* "did not involve any analysis, synthesis, or commentary, much less adopt a rule that such matters are irrelevant." Opp. 19. Not so. In that case, the plaintiff's deficient allega-

tions were based on an earlier-filed complaint that merely collected and synthesized facts previously disclosed in SEC filings. The court held that the earlier-filed complaint did not constitute a corrective disclosure because it "disclose[d] nothing new, but merely attribute[d] an improper purpose to the previously disclosed facts." 477 F.3d at 187.

Finally, plaintiff states that *Halliburton* did not involve the analysis of facts by a third party, but a statement by a defendant that was merely "confirmatory" of its prior statement. Opp. 19-20. True, but the Flynn reports could not be considered corrective disclosures under *Halliburton*. *See Halliburton*, 597 F.3d at 338 (discussing the distinction between "disclosures that had a *corrective* effect linked to a specific misrepresentation, as opposed to simply a *negative* effect" and holding that a corrective disclosure cannot be comprised of "confirmatory information").

Regarding the supposedly "more authoritative" nature of Flynn's report, plaintiff makes no serious effort to defend this aspect of the Ninth Circuit's decision. Plaintiff asserts that "the Ninth Circuit's choice of that particular word . . . would not warrant review," Opp. 21, even though "more authoritative" was obviously intended to convey the idea that it is permissible to premise a corrective disclosure on the prominence of the source as opposed to the newness of the facts. Plaintiff does not dispute that this view clashes with the efficient market theory—which posits that all publicly available information is reflected in a stock's price, regardless of the source, Pet. at 21-

22—and is flatly at odds with the views of the other circuits.

III. THE CIRCUITS ARE SPLIT REGARDING HOW QUICKLY INFORMATION IS INCORPORATED INTO PRICE

Plaintiff argues that there is no "relevant" circuit split regarding the timeframe in which information is impounded into price because the delay in this case was "only four trading days." Opp. 12-13. According to plaintiff, the cases cited by defendants are inapposite because they involved longer delays of two months or more. Opp. 14.

There are two responses to this: First, the cases cited by defendants use the language of "immediacy" because that accurately describes how the efficient market theory works. If there is a theoretical justification for the law adopting a more nebulous standard, plaintiff has not made it. Second, plaintiff's "four trading days" argument actually makes this an excellent case for review because it requires the Court to address the question left open by *Basic* regarding how quickly an efficient market incorporates information into price. There may have been good reasons to leave that question open 23 years ago, but the split in the circuits that has since developed demonstrates a profound lack of agreement regarding what the Court was intending when it incorporated the efficient market theory into the law.

Regarding the cases, the legal standard espoused by the Third Circuit is that the price reaction must be "immediate[]." *Oran v. Stafford*, 226 F.3d 275,

282 (3d Cir. 2000). There is no reason to believe that the Third Circuit used the word "immediate" to mean anything other than what it means in ordinary parlance. This is particularly true where the economic literature uses the same term. *See* Pet. 24.

Similarly unavailing is plaintiff's attempt to distinguish the Second Circuit's decision in *Omnicom* by saying that its statement that information is "promptly digested" in efficient markets is "not the stuff of precedent." Opp. 16. *Omnicom* uses that phrase not once, but three times, and it leaves no doubt about its validity as precedent: "appellant must concede that the numerous public reports on the Seneca transaction were 'promptly digested' by the market and 'reflected . . . in Omnicom's stock price' in 2001 while seeking to recover for a stock price decline a year later in 2002." 597 F.3d at 511.[1]

The First Circuit has also adopted a definition of efficiency that is aligned with that of the Second and Third Circuits. *See In re PolyMedica Corp. Sec. Litig.*, 432 F.3d 1, 14 (1st Cir. 2005) (definition of efficiency requires "prices [to] respond so quickly to new information that it is impossible for traders to make trading profits on the basis of that information"). *Polymedica* involved the vacating of a class certification order and its reasoning is quite similar to the Second Circuit's decision in *Teamsters Local 445 Freight Division Pension Fund v. Bombardier,*

---

[1] Plaintiff is correct that defendants erroneously cited the Eleventh Circuit's decision in *Thompson v. RelationServe Media, Inc.*, 610 F.3d 628 (11th Cir. 2010), as supporting a circuit split, and we regret that error.

Inc., 546 F.3d 196, 207-10 (2d Cir. 2008) (discussed in the petition (Pet. 17-18)).

Plaintiff disputes the relevancy of *Bombardier*, because class certification involves the application of the presumption of reliance, as opposed to loss causation. Opp. 16 n.9. Indeed, plaintiff takes it a step further and argues that not even the Third Circuit's decisions in *Oran* and *In re Burlington Coat Factory Securities Litigation*, 114 F.3d 1410 (3d Cir. 1997), are relevant because they are "about *materiality*, not loss causation." Opp. 26.

There is no theoretical justification for applying two or three different legal standards for market efficiency when it comes to the elements of materiality, loss causation, and the presumption of reliance. It defies logic that these three legal elements partake of the efficient market theory differently. In plaintiff's world, each circuit is entitled to develop its own rules regarding the speed with which an efficient market incorporates information into price, and each circuit may develop a different speed limit for the purposes of loss causation, materiality, and reliance. The Ninth Circuit recently did exactly that in *Miller v. Thane International, Inc.*, 615 F.3d 1095, 1103 (9th Cir. 2010), where it held that a "plaintiff establishes fraud on the market by demonstrating that a security is actively traded in an 'efficient market,' in which prices immediately reflect all publicly available information," but "an *immediate* response is not required for loss causation."

This asymmetrical approach to the legal application of the fraud-on-the-market theory is without

theoretical justification and is profoundly unfair to defendants. Its inconsistent application across the legal spectrum highlights the confused state of the law and the need for this Court to clarify the questions left unanswered in *Basic* and *Dura*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

E. Joshua Rosenkranz
Counsel of Record
Orrick, Herrington & Sutcliffe LLP
51 West 52nd Street
New York, NY 10019
(212) 506-5000
jrosenkranz@orrick.com

Daniel J. Tyukody
Jason Krajcer
Orrick, Herrington & Sutcliffe LLP
777 South Figueroa Street
Suite 3200
Los Angeles, CA 90017
(213) 629-2020

Counsel for Petitioners

February 16, 2011